No. 98296-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

GERRI S. COOGAN, the spouse of JERRY D. COOGAN, deceased, and JAMES P. SPURGETIS, solely in his capacity as the personal representative of the Estate of JERRY D. COOGAN, deceased,

Petitioners,

v.

GENUINE PARTS COMPANY and NATIONAL AUTOMOTIVE PARTS ASSOCIATION a.k.a. NAPA, *Respondents*, and

BORG-WARNER MORSE TEC, INC. (sued individually and as successor-in-interest to BORG-WARNER CORPORATION), *et al*.,

Defendants.

BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve its members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

Several of the interrelated issues in this case implicate applicable concerns for WDTL and its members, including how and when a reviewing court can determine that a verdict is excessive, and how to deal with misconduct of a party and/or of counsel that leads to an excessive verdict.

II. STATEMENT OF THE CASE

WDTL generally relies upon the facts set forth in Court of Appeals' Opinion, and in the applicable sections of Respondents' Supplemental Brief.

III. ARGUMENT

A. Washington Courts need a clearer test for determining the when a jury verdict is excessive.

The Court of Appeals' opinion in this case aptly summarized the applicable legal principles for a reviewing Court considering whether an award is excessive under CR 59(a)(5). The opinion acknowledged that the determination of damages in general, and economic damages in particular, generally falls within the province of the jury. *Coogan v. Borg-Warner Morse TEC Inc.*, 12 Wn. App. 2d 1021, 2020 WL 824192, *11 (2020) (citing *Bunch v.*

King County Dep't of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005)). Accordingly, "courts should be and are reluctant to interfere with the conclusion of a jury when fairly made." *Id*. (citing *Bingaman v. Grays Harbor Cmty. Hosp*., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985)). Out of that deference to the jury, a reviewing court generally "will not disturb an award of damages made by a jury unless it is [1] outside the range of substantial evidence in the record, ***or*** [2] shocks the conscience of the court, ***or*** [3] appears to have been arrived at as the result of passion or prejudice." *Bunch*, 155 Wn.2d at 175 (emphasis added) (quoting *Bingaman*, 103 Wn.2d at 835). Respondents briefing raises persuasive arguments that the verdict was improper under each of the three independently sufficient tests, though the Court of Appeals opinion—and this amicus brief—focuses specifically on the second inquiry, and how a judge or panel of judges is ultimately to determine what shocks the conscience of the court. *Coogan*, at *11 ("We focus on this [2] basis for granting relief under CR 59(a)(5). The question here is whether the $30 million pain and suffering verdict shocks this court's conscience.")

Under this test, a court looks to whether the damages awarded were "flagrantly outrageous and extravagant." *Bingaman* at 837. The award must strike the court "'at first blush, as being, beyond all measure, unreasonable and outrageous.'" *Bunch*, 155 Wn.2d at 179 (quoting *Kramer v. Portland-Seattle Auto Freight, Inc*., 43 Wn.2d 386, 395, 261 P.2d 692 (1953)). An "outrageous" verdict is one that is "'so flagrantly bad that one's sense of decency or one's power to suffer or tolerate is violated.'" *Washburn v. Beatt Equip. Co*., 120 Wn.2d 246, 279, 840 P.2d 860 (1992) (citation omitted). Here, the appellate court found the $30 million in noneconomic damages to be so outrageous and extravagant as to shock the court's conscience. The panel's conclusion was based in part on the fact that the decedent was largely unaffected until the final

six months of his life. So the $30 million award translated to $5 million for each month of suffering. *Coogan*, *12. But while the panel found this award to be shocking and that the trial court abused its discretion in denying a new trial, it also effectively admitted that the current test for determining when a verdict is excessive is subjective, and offers precious little guidance for how a judge is to make the determination. As Judge Maxa articulated:

> Our determination [that the verdict was excessive] necessarily is a subjective one. The Supreme Court has provided no objective basis for evaluating whether a verdict is excessive under CR 59(a)(5). *See Washburn*, 120 Wn.2d at 266-68 (prohibiting the court from assessing excessiveness by comparing the verdict against verdicts in other cases).

Id. Judge Maxa's opinion articulates the challenge every reviewing judge faces in determining whether and when to intervene in the face of a shocking or excessive verdict. On one hand, this Court's holding in *Washburn* appears to prohibit courts from comparing a verdict with verdicts from other analogous cases. On the other hand, courts are tasked with the authority, and indeed the responsibility, to act as a check against disproportionate and shocking verdicts. But this exercise is inherently, inescapably, a *comparative* one. Something is only shocking because it is so far out of line with the reviewing judge's prior expectation, as established by his or her experiences in past cases or like circumstances, as a judge, practitioner, or citizen.

The holding in *Washburn*—and the resulting lack of clear guidance for evaluating excessiveness that Judge Maxa grappled with—is problematic for several reasons, and should be revisited now.

First, *Washburn* upended this Court's longstanding history of not just allowing but actually conducting precisely the type of comparisons that *Washburn* deemed improper. *See, e.g.*, *Stanley v. Stanley*, 32 Wash. 489, 493,

73 P. 596 (1903) ("The amount returned was not immoderate when compared with verdicts in similar cases[.]"); *Ball v. Peterman Mfg. Co.*, 47 Wash. 653, 656, 92 P. 425 (1907) ("It is also contended that the amount of the verdict in this case was excessive, and as compared with verdicts which have been sustained in other cases where the injuries were incomparably greater, we think this contention ought to be sustained. The judgment will be affirmed on condition that the respondent remit the sum of $1,000 from the [$2,500] judgment obtained."); *Kramer v. Portland-Seattle Auto Freight, Inc.*, 43 Wn.2d 386, 398, 261 P.2d 692 (1953) ("The amount of the combined verdict for the two injured parties is high, especially when compared with decisions of this court a generation ago."). This Court has been clear that it "will not overrule such binding precedent sub silentio." *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 388, 241 P.3d 1256 (2010) (quoting *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999)). But the *Washburn* Court prohibited such comparisons without acknowledging that well-established, longstanding precedent, let alone articulating any intention to reverse it. There is plainly an unreconciled contradiction between *Washburn* and the cases that preceded it, and this appeal presents a perfect opportunity to address that.

Second, there is an inherent tension, and even an internal inconsistency, in *Washburn*'s prohibition on comparing verdicts while simultaneously requiring a judge or panel to draw on whatever experiences they might have at hand to decide when the court's conscience has been shocked. Again, a judge's task in giving voice to the collective judicial conscience is inherently a comparative exercise; and the current test inherently requires such comparison while explicitly prohibiting it. Suppose a trial court judge has recently come to the bench after practicing exclusively criminal law, and then, faced with her

first civil tort case, must determine whether a verdict is so excessive as to be shocking. Where is the pool of experience upon which the judge will draw? What tools should she be afforded to consider, in making that determination? It is clear in such a scenario that at least some consideration of prior cases with similar injuries or alleged damages would be one particularly useful tool, among the judge's own lived experience, conscience, and other resources that a judge will bring to the task—not as controlling or dispositive authority, but merely as additional information that could help provide insight and some measure of objectivity.[1]

Washburn was plainly concerned that allowing any comparison would hamstring the court and constrain it relative to prior verdicts: "Defendant would consign damages for personal injuries to the cold world of accounting balance sheets… [such] that a verdict can never exceed what has historically been awarded for what defendant conceives to be comparable injuries—so much for a particular injury and no more, ever." 120 Wn.2d at 266-67. This concern is undermined by this Court's long history of allowing for precisely such comparisons, which *Washburn* declined to acknowledge. But more importantly, it takes a needlessly dim view of a judge's capacity to consider and weigh comparable cases in their proper context—as helpful and instructive, not as binding or dispositive, since each case's facts and circumstances are unique. Comparing a verdict to others from similar cases need not (and did not historically) constrain the court, but instead expands the court's experience and background knowledge, and allows it to act as the

[1] It bears noting that Chief Judge Maxa has been on the bench since 2013, and before that, had 28 years of experience in civil practice as both a trial and appellate attorney. He determined that the verdict was "beyond all measure, unreasonable and outrageous", which was undoubtedly informed, in some measure, by his own ample experience. But he described that conclusion as a necessarily *subjective* one. Of course, parties could not always count on a judge with such experience.

"judicial conscience" with more information, not less. It is not dangerous to put this information in the hands of a judge, because Washington's judges are capable of taking into account many different factors and affording them appropriate weight. If a case before a reviewing judge has specific extenuating circumstances that merit a dramatic departure from verdicts in prior cases, that's something a judge could recognize and articulate. Any finding thereafter that a verdict does or does not shock the court's conscience would be better founded and more difficult to attack on appeal, not less.[2]

Third and finally, the 18 intervening years since *Washburn* was decided have seen the rise of new and better technology and access. *Washburn*'s rejection of comparing verdicts rested in significant part on the Court's concern that the verdicts proffered by the defense were unreliable. 120 Wn.2d at 266 ("All that defendant provides is a few summary lines describing injuries, apparently from an unofficial publication, Jury Verdicts Northwest.") But that same resource, and others just like it, is now readily available to every judge and practitioner, on Lexis, Westlaw, Bloomberg, and through other reporting services and law libraries. These are tools that practitioners, businesses, and arbitrators look to regularly, because they help in broad terms to evaluate the range of likely outcomes, and to set expectations. In short, the concerns that *Washburn* articulated with this practice have faded in the intervening years, and most no longer apply. To prohibit a Court from using such tools in 2020 does not further justice, but simply requires a judge to act as the judicial conscience with *less* information and less objectivity.

[2] This rationale also need not apply only to potentially excessive verdicts—a verdict that was shockingly or outrageously low could similarly be rejected or modified if it was a dramatic departure from verdicts in comparable cases and shocked the court—in that instance, to a plaintiff's benefit.

B. The existence of both attorney and party misconduct merits remand for a determination of appropriate sanctions.

1. The trial court's failure to consider newly presented evidence of party misconduct under CR 60—or even to allow discovery thereon—undermines the entire damages award and necessitates further investigation, discovery, and potential sanctions.

At trial, the jury awarded $80 million in noneconomic damages, including $30 million to Gerri "Sue" Coogan and $10 million each to the decedent's adult daughters, Roxana and Raquel for the loss of their relationships with their father. CP 15021. The award also included an additional $30 million to the decedent's estate, premised in part on mental anguish he is presumed to have suffered at the thought of leaving behind his family and contributing to their loss. After the verdict, GPC and NAPA, having tracked the separate Stevens County probate action, identified a litany of troubling new evidence from 2016 showing that the decedent and Sue's relationship and marriage was extremely unhappy, which the Coogans appear to have hidden or withheld from the defendants and the Court during trial. *Coogan*, *12, fn. 2. The details of those newly discovered facts are set forth in Respondents' Supplemental Brief (pp. 24-26), and defendants' CR 60 Motion (CP 22569-82), and those facts would have undermined the central basis for the jury's $80 million noneconomic damages award. There is no doubt the excessive verdict in this case was premised on the jury's perception that Sue and the decedent were close and had a loving relationship—because that's the story plaintiffs and their counsel told the jury and, due to plaintiffs' success in hiding and withholding evidence, the defendants were denied an opportunity to rebut it.

The defendants promptly moved to set aside the verdict under CR 60(b)(3) and (4), arguing the undisclosed statements either constituted newly

discovered evidence or reflected misconduct on the part of the plaintiffs for failing to disclose them. *Id*. The Court of Appeals declined to address this newly discovered evidence or reach the issue of the trial court's denial of the CR 60 motion, because it was already remanding for a new damages trial. *Coogan*, *12, fn. 2. But the fact that the appellate court did not reach this issue does not make it less important on this appeal. In fact, this issue should be of utmost importance to this Court on review now, not just because of the manifest error in the trial court's handling of the CR 60 motion, but also because of the potential that the plaintiffs' failure to disclose this evidence was calculated, and may reflect a fraud perpetrated on the Court. The fact that the plaintiffs appear to have hidden evidence that the family relationships were actually rancorous and back-biting rather than loving is not irrelevant or outweighed by its prejudicial effect, as the trial court concluded in denying a new trial. CP 22555-56. Instead, it was something the plaintiffs relied on to materially distort the evidence submitted to the jury. Given the size of the verdict, it is safe to assume plaintiff's gambit worked in securing the jury's sympathy. In any case, this issue is inextricably interrelated with the issue of excessiveness addressed above.

The court's inherent power to sanction is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). Sanctions may be appropriate if an act affects "the integrity of the court and, [if] left unchecked, would encourage future abuses" or "if the 'very temple of justice has been defiled' by the sanctioned party's conduct." *Id*. (citations omitted). The U.S. Supreme Court has explained that an inquiry into potential

fraud upon the court under Rule 60(b) focuses less on whether the alleged fraud prejudiced the opposing party (though that factor would plainly be satisfied in the present case), and more in terms of whether the alleged fraud harms the integrity of the judicial process. *Hazel–Atlas Glass Co. v. Hartford Empire Co*., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), *overruled on other grounds, Standard Oil of Cal. v. United States*, 429 U.S. 17, 18, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976). This is necessary because "tampering with the administration of justice … involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Id*. It is clear that plaintiffs failed to disclose the newly presented evidence here, and that failure, at a minimum, establishes prima facie evidence of potential impropriety.

Even before considering the concerns raised by fraud on the court, it is clear on the face of the trial court's Order that it erred by declining to consider defendants' CR 60 motion under the proper legal standard. The Order confirms that the trial court did not even conduct a hearing on the motion. CP 22555-56. While the motion was presented under CR 60(b)(3) and (4), the Order—and its apparent rationale for denying the motion—contains no mention of the actual factors to be considered under either CR 60(b)(3) or (4), let alone an appropriate analysis thereunder.[3] The erroneous application of law reflected there alone merits reversal of the trial court's denial of relief under CR 60 because a trial court necessarily abuses its discretion by applying the incorrect

[3] For example, the trial court's order makes no mention of the five elements a moving party must establish under CR 60(b)(3). *See Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2013) (Newly discovered evidence warrants a new trial under CR 60(b)(3) where it (1) would probably change the result if a new trial were granted, (2) was discovered since the trial, (3) could not have been discovered before the trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching.).

legal analysis. *In re Marriage of Schnurman*, 178 Wn.App. 634, 638, 316 P.3d 514 (2013). But even the alternative factors the trial court purported to rely on in denying the motion contain their own error. For example, the trial court found: "Much of the material in [defendants'] supporting documentation is hearsay, improper opinion evidence by lay witnesses, and evidence which if even marginally relevant, is wholly outweighed by its prejudicial effect." CP 22555-56. The conclusion of hearsay ignored the fact that the statements were converted into sworn declarations before filing, or the fact that if there were concerning but inadmissible statements, the proper recourse was to order additional discovery.

Perhaps more importantly, the trial court's cursory denial of the CR 60 motion failed to acknowledge that defendants had made just such an alternative and lesser request for relief with a lower threshold. Specifically, the defendants requested that the court at least order discovery to investigate the key facts around the newly discovered evidence and the potential fraud on the court they reflected. CP 22569-82. In other words, even if the trial court did not feel comfortable vacating the verdict or ordering a retrial based on the newly presented evidence before it, it could have—and should have—stayed the matter and ordered further discovery in order to find out who knew what, and when. It is unclear, for example, whether there was intentionality or bad faith on the part of the plaintiffs in failing to disclose the existence of that contradictory evidence that defendants found and presented. But it is clear they must have been aware of that contradictory evidence and failed to produce it at trial; and it is clear that evidence would have undermined the plaintiff's position and the rosy picture they sought to paint at trial. It is similarly unclear whether plaintiffs' counsel had any inkling of the existence of that evidence from 2016—but the risk that they were made unwitting parties to that omission

should have been as concerning to them as it was to the trial court, and to this Court now. These concerns should have been within the scope of additional inquiry and discovery after the CR 60 motion, and should be going forward on remand from this Court as well. The trial court's Order reflects that it simply abdicated its responsibility to investigate and ensure that the integrity of the judicial process had not been tampered with. Courts' authority to protect and sanction against potential fraud is manifest, arising not out of rule or statute but as part of their inherent power. This Court should remand on this issue, not just to rectify the trial court's specific errors in its Order denying defendants motion for a new trial, but because if there has been potential fraud on the court that lead to the verdict, that is evidence that the Court should want to shine light on and explore, as a function of safeguarding the integrity of the judicial process writ large.

2. **The Coogans' counsel's misconduct put defendants in an impossible situation; Washington law does not adequately deter such attorney misconduct.**

In addition to the party misconduct discussed above, the plaintiff's attorneys also committed significant and impactful misconduct at trial as well. Here, the Court of Appeals agreed that some of that conduct "clearly was improper and violated the trial court's pretrial ruling" but it ultimately affirmed the trial court's denial of defendants' CR 59 motion for a new trial, concluding it was not sufficiently prejudicial in the midst of a three-month long trial. *Coogan*, *14.

Respondents Supplemental Brief addresses the three predominant categories of misconduct, and Judge Lee's dissent provides a sharp road map for why those instances of misconduct, both independently and collectively, were prejudicial and should have merited a re-trial. *Coogan*, *23-26 (J. Lee

dissenting). Indeed, in each instance of misconduct, the trial court also failed to consider "whether the conduct was misconduct that was prejudicial and objected to at trial and whether the prejudice was cured by the trial court's instructions." *Id*. (citing *Teter v. Deck*, 174 Wn.2d 207, 226, 274 P.3d 336 (2012)). WDTL need not rehash each of those issues, but writes to highlight the particular and problematic challenges facing a practitioner under Washington's Rules of Evidence, embodied by the scenario that unfolded here; where there is misconduct and an objection, but then the trial court's ensuing "curative" instruction either fails to correct, or actually worsens the misconduct it sought to fix. This was the case in at least two instances here—first when plaintiff's counsel asked questions regarding other asbestos-related worker deaths, and second, when counsel implied bad faith in the selection of GPC's corporate witness.

In the first, plaintiff's counsel, despite explicit court rulings prohibiting her from doing so, asked a GPC representative: "Do you know how many other men that worked in their headquarters where they were making Rayloc[] brakes have died from asbestos-related disease and haven't been called?" 22 RP 83-85. As Judge Lee explained, the question was egregious and prejudicial. It not only violated a pretrial order, but clearly was intended to imply that GPC was aware of and responsible for other asbestos-related deaths at its facility. The ensuing curative instruction given by the trial court, however, effectively echoed and ratified the misleading statement it tried to cure:

> Yesterday Plaintiffs' counsel asked a question of Ms. Brewer regarding deaths at the Rayloc facility. *There will be no evidence of deaths at the Rayloc facility related to asbestos exposure in this case. You may not consider such fact* in your deliberations of this case, and you may not discuss that in your deliberations of the case.

Coogan, *24 (citing 23 RP 55). "Thus, the jury heard the implication in counsel's question that there were other asbestos-related deaths at the Rayloc brakes facility, and then the trial court reminded the jury of the existence of other asbestos-related deaths the next day." *Id*. This circumstance underscores the challenge the objecting party faces when the Court's instruction is *presumed* to cure the prejudice, but instead not only fails to cure it but exacerbates it.

Washington's Rules of Evidence impose a duty on counsel to keep inadmissible evidence and argument from the jury. *See Teter*, 174 Wn.2d at 223. To avoid waiver, counsel must generally raise a contemporaneous objection to improper questioning or argument. *See, e.g., Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 333, 858 P.2d 1054 (1993). When a new trial is sought in response to attorney misconduct, "a court properly grants a new trial where (1) the conduct complained of is misconduct, (2) the misconduct is prejudicial, (3) the moving party objected to the misconduct at trial, and (4) the misconduct was not cured by the court's instructions. *Teter*, 174 Wn.2d at 226. A curative instruction, however, is presumed to eliminate any prejudice resulting from attorney misconduct: "A jury is presumed to follow the court's instructions and that presumption will prevail until it is overcome by a showing otherwise." *Carnation Co. v. Hill*, 115 Wn.2d 184, 187, 796 P.2d 416 (1990).

Washington law evidences a clear intent to deter misconduct, and ensure that parties obtain a fair trial. For instance, RPC 3.4(e) expressly states that "[a] lawyer shall not, in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence…." Nevertheless, unless the party victimized by misconduct can overcome the presumption that a curative instruction eliminated its prejudicial

effect, there are no consequences beyond admonishment. The current rules of evidence create a paradox on this issue. To properly preserve an issue for appeal, a party that falls victim to such misconduct must object and should request a curative instruction. But it is often questionable whether the instruction actually ameliorates the problem—either because objecting may have the effect of highlighting or emphasizing the prejudicial event (in a way that the offending attorney might actually desire with the misconduct in the first place), or, as here, because the curative instruction is inadequate for the task. In many cases, like this one, the offending attorney is effectively rewarded for the misconduct. The presumption in the offending lawyer's favor—or requiring the aggrieved party to show enough prejudice to overcome the presumption of an effective instruction and cure—actually incentivizes the kind of misconduct that Washington law seeks to deter.

This appeal presents the Court with the opportunity to address this problem, and consider adopting a new and fairer standard that will more effectively deter attorney misconduct. The current presumption is that a curative instruction is effective and eliminates any prejudice resulting from attorney misconduct. A better standard would shift that presumption, so that where an attorney commits objectionable misconduct—such as the clear violation of a pretrial ruling that occurred here—such misconduct is instead *presumed* to have been prejudicial, unless the offending party can prove that the misconduct did not prejudice the other party, or can prove that a curative instruction was effective in ameliorating any prejudice. Placing the burden on the party engaging in the pervasive misconduct would be a much more effective deterrent. If counsel knew she would be required to demonstrate that her improper questions or argument were not prejudicial, she would be far less likely to engage in such conduct.

IV. CONCLUSION

The verdict in this case highlights the fact that a reviewing judge should, and must, be properly equipped to act as a check to correct such excessive and shocking verdicts—but their ability to act in that capacity is needlessly constrained and subjective. This Court should reconsider *Washburn*'s prohibition on comparing verdicts and reconcile that holding with the previous, longstanding, and contradictory history of Washington Courts conducting precisely such comparisons without issue. The excessive verdict was also obtained here as a direct result of the underlying misconduct of both plaintiffs and their counsel. While neither the appellate panel nor the trial court reached the CR 60 motion and its evidence of party-misconduct, this Court should address that issue and should order discovery thereon, with the utmost concern for safeguarding the integrity of the judicial process.

Respectfully submitted this 25th day of September, 2020.

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DECLARATION OF SERVICE

The undersigned does hereby declare and state as follows: On the date set forth below, I caused to be served: **BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS** in the within matter by arranging for a copy to be delivered on the below-listed interested parties in said action via Appellate Portal.

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on September 25, 2020 at Seattle, Washington.

/s/ Ian McDonald
Ian McDonald

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